



STATE OF IDAHO

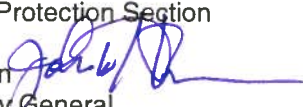
OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

MEMORANDUM

DATE: June 22, 2015

TO: Thomas F. Neace, Manager
Ground Water Protection Section

FROM: John W. Homan 
Deputy Attorney General
Natural Resources Division

SUBJECT: **Attorney General's Statement of Authority for Revised Underground Injection Control (UIC) Regulations**

In accordance with Part C of the Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. 300(h) *et. seq.*, as amended, and 40 CFR §145.32(b)(1), under the laws of the State of Idaho, the Idaho Department of Water Resources (IDWR) has the authority to implement and enforce its UIC program, including amendments made to IDWR's rules in response to EPA's 1999 revisions to the federal UIC program.

The authorities cited below include statutes from title 42, chapter 39 Idaho Code and promulgated state rules that have been in full force and effect since March 20, 2014. Included are revisions to the Idaho code and to the UIC rules which were made so that Idaho's program would remain consistent with the new minimum federal requirements for state UIC programs. Regulatory authorities are provided to IDWR through statutes found in Title 42, Chapter 39 of the Idaho Code and by rules found in the Idaho Administrative Procedures Act 37.03.03.

The scope of this statement is limited to the 2015 revisions to Idaho's UIC rules. For information regarding IDWR's authority to implement the UIC program as initially authorized, please see the Attorney General's statement dated October 31, 1984 submitted as part of Idaho's original Primacy Application Package.

Idaho Code, Title 42, Chapter 39: "Injection Wells"

I.C. § 42-3901:	Ground Water as a Public Resource -- Protection
I.C. § 42-3902:	Definitions
I.C. § 42-3902A:	Prohibition of Injection of Hazardous Wastes and of Radioactive Wastes
I.C. § 42-3903:	Deep Injection Wells – Construction – Modification – Use – Permit Required
I.C. § 42-3903A:	Shallow Injection Wells – Authorization for Construction and Use
I.C. § 42-3904:	Application for Permit – Owner – Operator Responsible – Notice of Construction Form
I.C. § 42-3905:	Fees – Transmitted to State Treasurer
I.C. § 42-3907:	Department of Water Resources – Public Notice and Investigation
I.C. § 42-3908:	Permit approving Construction and Use – Conditions – Rejection of Application

Idaho UIC Program Element 2: Attorney General Statement of Enforceability

I.C. § 42-3909:	Disapproval of Application – Owner or Operator Entitled to Hearing – Procedure – Judicial Review
I.C. § 42-3910:	Cancellation of Permit – Notice – Hearing -- Review
I.C. § 42-3911:	Failure to Obtain Required Permit or Submit Required Information -- Penalty
I.C. § 42-3912:	Drillers – Must be Licensed – Approved Permits – Certified Copies
I.C. § 42-3913:	Minimum Standards – Rules and Regulations -- Adoption
I.C. § 42-3914:	Board to Establish Standards
I.C. § 42-3915:	Adoption of Regulations
I.C. § 42-3916:	Enforcement Procedure – Injunctive Relief
I.C. § 42-3917:	Civil Penalties – Injection of Hazardous and Radioactive Wastes
I.C. § 42-3918:	Cease and Desist Orders – Injection of Hazardous and Radioactive Wastes
I.C. § 42-3919:	Criminal Penalty – Willful Violation – Violation of Cease and Desist Order

Idaho Administrative Procedures Act 37.03.03: “Rules and Minimum Standards for the Construction and Use of Injection Wells”

Section 000:	Legal Authority
Section 001:	Title and Scope
Section 002:	Written Interpretations
Section 003:	Administrative Appeals
Section 004:	Incorporation by Reference
Section 005:	Office – Office Hours – Mailing Address and Street Address
Section 006:	Public Records Act Compliance
Section 010:	Definitions
Section 015:	Violations, Formal Notification and Enforcement
Section 020:	Hearing Before the Water Resources Board
Section 025:	Exemption from Drinking Water Source Designation
Section 030:	Severability
Section 035:	Classification of Injection Wells
Section 040:	Authorizations, Prohibitions, and Exemptions
Section 045:	Class II: Application Information
Section 048:	Class II: Application Processing
Section 051:	Class II: Permit Conditions
Section 054:	Class II: Operating Requirements
Section 057:	Class II: Actions on Approved Permits
Section 060:	Class II: General Provisions
Section 070:	Class V: Criteria and Standards

A letter sent by Peter Contreras (EPA) to Thomas Neace (IDWR) received on December 19, 2014 requested IDWR address two specific topics in this AG statement. The two topics are (1) improved sinkholes and (2) Idaho’s definition of “injection well”. These two topics will be addressed separately below.

(1) Improved Sinkholes

A result of the statutory and rule revisions made in Idaho over the last several years is consistency between EPA and Idaho regulations regarding the definition of an “improved sinkhole”. When improved sinkholes are identified IDWR will process the permit application or inventory form in the same manner that other sub-classes of Class V injection wells are processed.

(2) Idaho’s definition of “injection well”

Idaho’s definition of “injection well” differs from that of EPA’s in one aspect: a clarification was added to distinguish oil/gas production wells from definable Class II injection wells. The text of this clarification is as follows:

Provided however, that "injection well" does not mean or include any well used for oil, gas, or geothermal production activities, other than one into which diesel fuels are injected pursuant to hydraulic fracturing operations.

The original proposed revision utilized the word "drilled" instead of the word "used" underlined in the clarification above.

I will first provide some background information on how both the statutory and rule change came about as this background is informative. Concerns regarding the definition of injection well were first brought to the Department's attention back in 2013 by the U.S. EPA after the Idaho legislature amended Idaho Code § 42-3902(10). The EPA contacted the Department with concerns regarding the statutory definition and asked the Department to amend the statutory definition to close what the EPA perceived as a shortcoming in the definition. Specifically, EPA was concerned that by using the term "drilled" in the definition, the Department would never have jurisdiction over those oil and gas wells which were "drilled" for oil and gas production purposes and later converted to injection wells. While not agreeing with the EPA's interpretation, the Department agreed that it would be willing to work on revised language with the EPA. After communications on this issue, it was agreed the Department would seek to have the term "drilled" replaced with the term "used." The Department prepared draft legislation wherein there was only one substantive change to the statute: the term "drilled" was struck and replaced with "used." The express purpose behind the legislative change was to ensure the Department had jurisdiction over "oil and gas production wells that are converted to injection wells and used for the injection of waste fluid." Ultimately, the change was approved by both houses of the legislature and signed by the Governor on March 18, 2014.

The purpose of the rule revision was to make the rule match the statutory change adopted in 2014 in order to avoid any conflict between the rule and statute. The statutory and rule revision included the term "*used*" which is defined by Merriam Webster's Dictionary as: "employed in accomplishing something." Thus, under the plain reading of the statute, once an oil and gas well is no longer employed in accomplishing the production of oil and gas, it is no longer "used" for oil and gas production activities. At that point, if the well is being used for injection purposes, it would be subject to the Department's jurisdiction. While the Department believes the language is clear on this issue, to the extent someone could argue there is ambiguity in this definition, a court would look to the legislative history surrounding the definition. As the statement of purpose for the legislation expressly provides that that the statute change in 2014 was to ensure that oil and gas production wells that are converted to injection wells would be subject to regulation by the Department pursuant to the Underground Injection Rules, any argument that the Department lacks jurisdiction over a converted well is contrary to the legislative history.